

AMTA

American Mobile Telecommunications Association

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August 30, 1994

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

**Re: Emergency Motion for Stay of 800 MHz SMR Application Freeze
GN Docket No. 93-252**

Dear Mr. Caton:

On behalf of the American Mobile Telecommunications Association, Inc. ("AMTA"), the Council of Independent Communication Suppliers, the Industrial Telecommunications Association and the National Association of Business and Educational Radio, Inc., enclosed herewith please find their Emergency Motion for Stay of 800 MHz SMR Application Freeze in the above-referenced docket. Please be advised that, in addition to those FCC officials listed in the Certificate of Service attached to this Motion, copies of this document are being supplied to Sen. Daniel K. Inouye, Sen. Bob Packwood, Rep. John D. Dingell and Rep. Edward J. Markey.

Kindly refer any questions or correspondence to the undersigned.

Sincerely,



Jill M. Lyon
Director of Regulatory Relations
AMTA

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FED-1000

AUG 30 1994

In the Matter of)
)
Implementation of) GN Docket No. 93-252
Sections 3(n) and 332 of)
the Communications Act)
)
Regulatory Treatment)
of Mobile Services)

To: The Commission

Emergency Motion For Stay of Application Freeze

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E X E C U T I V E S U M M A R Y

AMTA, CICS, ITA and NABER hereby request a stay of the freeze announced August 9, 1994 by the Federal Communications Commission on the filing of new 800 MHz SMR applications for both trunked and General Category channels.

The petitioners are also concerned that the FCC intends to cease work on the processing of SMR applications for 800 MHz that are currently pending at the Commission's Licensing Division. For several reasons, the petitioners believe it is essential that the Commission continue processing all pending SMR applications.

Neither the freeze on the filing of new SMR applications nor the suspension of the processing of applications already filed with the Commission serve the public interest. Accordingly, in this Emergency Motion for Stay of Application Freeze, the petitioners request the Commission to: (1) immediately lift the freeze on the filing of new applications, and (2) resume the processing of applications already on file at the FCC.

The application freeze has had a direct and immediate impact on each of the petitioners and their memberships. There are thousands of applications for SMR frequencies either already at the FCC or in the final stages of preparation. Additionally, approximately 3,000 SMR applications are currently undergoing frequency coordination by ITA and NABER.

The freeze will: (1) strand capital expenditures, (2) result in denial of communications service; (3) impose a widespread negative impact on applicants and the public; and (4) place SMR licensees, which are in direct competition with cellular companies,

in an inferior competitive position by perpetuating regulatory disparity.

Similarly, the suspension of processing those applications already filed with the FCC will have a direct and immediate impact on each of the petitioners and their memberships. Securing access to radio frequencies is vital to the economic and business success of SMR licensees and the hundreds of thousands of customers they serve. The congressional desire to implement regulatory parity will not be successful unless the Commission fosters an environment in which SMR licensees have the spectrum resources necessary to compete with the existing common carriers.

Suspension of application processing at the FCC is inimical to regulatory parity. It enhances the many competitive advantages already enjoyed by cellular licensees. For these reasons, the petitioners ask that the Commission immediately resume the processing of SMR applications that are now pending within the FCC's Licensing Division and stay the freeze on new 800 MHz applications.

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Emergency Motion For Stay of Application Freeze

I. INTRODUCTION

¹ FCC News Release Report No. DC-2638, "Regulatory Framework for CMRS Completed," released August 9, 1994 (hereinafter News Release).

trunked and conventional 800 MHz and 900 MHz SMR operators, licensees of wide-area SMR systems and commercial licensees in the 220 MHz band. These members provide commercial wireless services throughout the country, and represent the substantial majority of those private carriers whose systems have been reclassified as CMRS.

CICS is an unincorporated association of entities engaged in serving the needs of private radio eligibles, particularly those located in small and rural communities throughout the United States. CICS' membership is open to SMR operators, radio dealers, equipment suppliers, and consultants. CICS was formed to provide small SMR operators, radio dealers and other entities with a voice in the policy-making process governing use of the electromagnetic spectrum, especially spectrum allocated to the private land mobile radio services. CICS is an independent membership market council of ITA.

ITA is an association organized under the laws of the District of Columbia. ITA is the Commission's certified frequency coordinator for the Special Industrial Radio Service and the Industrial/Land Transportation 800/900 MHz frequency "pools." ITA also coordinates General Category applications filed by entities: (a) eligible to become Industrial/Land Transportation licensees; (b) wishing to expand trunked systems; or (c) consolidating conventional systems into a trunked system. ITA enjoys the support of a membership that includes more than 8,500 private land mobile radio communications licensees.

NABER is a national non-profit trade association that represents the interests of large and small businesses that use land mobile radio communications as an important adjunct to the operation of their businesses and that hold thousands of licensees in the private land mobile services. NABER has six membership sections representing users, private carrier paging licensees, radio system integrators, SMR operators, tower site owners and managers and radio technicians. NABER is the FCC-certified frequency coordinator for the Business Radio Service. NABER also coordinates also coordinates General Category applications filed by entities: (a) eligible to become Business Radio Service licensees; (b) wishing to expand trunked systems; or (c) consolidating conventional systems into a trunked system.

The Petitioners are involved on a day-to-day basis with the 800 MHz SMR industry through frequency coordination and trade association activities; thus, they have a vital interest in the Commission's decisions in this area.

II. FACTUAL BACKGROUND

One year ago, Congress enacted legislation which, among other matters, reclassified all land mobile radio systems as either Commercial or Private Mobile Radio Service ("CMRS" or "PMRS," respectively).² The legislation further directed the FCC to determine which systems should fall within each of these

² Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

categories, and to modify its rules by August 10, 1994 to the extent necessary to create regulatory symmetry among CMRS services deemed substantially similar to one another.³

The Commission responded to the first Congressional directive by adopting rules which reclassified a number of heretofore private radio systems as CMRS.⁴ On August 9, 1994, the agency adopted a Third Report and Order in the next phase of this regulatory restructuring, the substance of which was outlined in a News Release issued on August 10, 1994.⁵ That News Release stated the FCC's conclusion that virtually all CMRS services are "actually or potentially competitive with each other," and that the range of services deemed substantially similar for regulatory purposes should therefore be defined broadly.

The August 9th News Release also noted that the FCC intended to issue a Further Notice of Proposed Rule Making in an outstanding proceeding regarding the wide-area licensing of 800 MHz systems.

³ Id. at § 6002(d)(3).

⁴ In re Implementation of Sections 3(n) and 332 of the Communications Act and Regulatory Treatment of Mobile Services, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd. 1411 (1993).

⁵ FCC, News Release, Report No. DC-2638, August 9, 1994. The News Release is an unofficial announcement of Commission action. Release of the full text of the Commission's order constitutes official action. See MCI v. FCC, 515 F.2d 385 (D.C. Cir. 1974). To date, the Commission has not released the text of its decision imposing the freeze. In accordance with § 1.103, the effective date of the Commission's action in this matter is the date of public notice, unless another date is specified by law or Commission rule. 47 C.F.R. § 1.103 (1993). In a notice and comment rule making proceeding, public notice normally occurs on the date of publication in the Federal Register. 47 C.F.R. § 1.4(b)(1) (1993).

Finally, and most critically, the Commission announced that in anticipation of the changes that might be implemented as a result of that prospective Further Notice, the FCC suspended, effective immediately, the acceptance of "new 800 MHz SMR applications," pending adoption of those new rules. The Petitioners have also been advised informally that the FCC has already stopped processing the approximately eleven months worth of SMR applications already on file with the agency, with some minor exceptions.⁶

For several reasons, the private land mobile 800 MHz (806-821/851-866 MHz) band presents matters of unique regulatory complexity. In addition to SMR applicants, the band provides spectrum to satisfy the essential day-to-day telecommunications needs of business, industrial, land transportation and public safety licensees. The following facts are relevant:

- a. There are a total of 600 channel pairs available for private land mobile radio users in the band. This includes 150 General Category channel pairs, 280 SMR channel pairs, 70 Public Safety channel pairs, 50 Industrial/Land Transportation channel pairs, and 50 Business Radio Service channel pairs.
- b. The freeze on SMR applications directly affects 430 channel pairs (the 150 General Category channel pairs and the 280 SMR channel pairs), or 72% of the spectrum in the 800 MHz band.
- c. Under the FCC's rules, the 150 General Category channel pairs are available equally to all private radio eligibles, including SMR, public safety, industrial/land transportation and business.

⁶ The Petitioners believe that the FCC is continuing to process applications for assignments and transfers of control that involve no change in the technical parameters of the stations. The agency is also apparently deliberating whether it might continue granting minor modifications, and the definitions thereof.

- d. With the freeze in effect, only public safety, industrial/land transportation, and business entities will be able to apply for the General Category channels.
- e. Collectively, ITA and NABER have approximately 3,000 SMR applications for the 800 MHz band that are currently in various stages of frequency coordination. If the freeze remains in place, the FCC will not accept any of these applications for filing.

III. SUMMARY OF ARGUMENTS

For the reasons set forth below, the Petitioners urge the Commission to lift the freeze on the filing of applications and resume processing applications already filed with the Licensing Division:

- 1. The FCC's actions are directly contrary to the Congressional mandate to create comparable regulatory schemes for "substantially similar" services. Contrary to the fundamental purpose of regulatory parity, the FCC has frozen one segment of the wireless industry at a critical stage in its development.
- 2. The freeze on applications and the suspension of processing will strand the tens of millions of dollars invested in system planning and application preparation, disrupt the long-term business plans of numerous small and large businesses, and delay indefinitely the implementation of systems with enormous potential for job creation and competitive service provision.
- 3. The freeze on applications will deny use of the 800 MHz band to one class of eligible entity while allowing other classes of eligible entities to have continued access to the band. However, applications from all classes of eligible entities are intermingled during the frequency coordination process. Coordinators are not able to consider the numerous pending applications received prior to August 10th in order of receipt, as required by the FCC's 1986 Report and Order in Docket No. 83-737.⁷ Therefore, the freeze creates an untenable situation in the frequency coordination process.

⁷ In re Frequency Coordination in the Private Land Mobile Radio Services, Report and Order, PR Docket No. 83-737, 103 F.C.C.2d 1093, paragraph 21 (1986).

IV. REQUEST FOR STAY

A. Overview

The News Release discusses only the imposition of a freeze on the filing of new 800 MHz SMR applications, including SMR applications for the General Category channels. However, the Commission's staff has suspended the processing of SMR applications, including SMR applications for the General Category channels, that were previously filed with the FCC and are now in various stages of processing.

B. A Stay of the Application Freeze is Warranted.

1. Applicable Case Law Supports a Stay.

Virginia Petroleum Jobbers Association v. Federal Power Commission⁸ and Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.⁹ set forth the standard for staying decisions issued by an administrative agency of the federal government. To successfully stay a governmental decision, petitioners must demonstrate that (1) they are likely to prevail on the merits; (2) absent a stay of the agency's action, they will be irreparably harmed; (3) grant of the requested stay will not harm other interested parties; and (4) staying the agency's action is in the public interest.¹⁰ If the factors two through four favor the grant of a stay, a petitioner must show only that serious questions have

⁸ 259 F.2d 921 (D.C. Cir. 1958) ("Virginia Jobbers").

⁹ 559 F.2d 841 (D.C. Cir. 1977) ("Washington Transit").

¹⁰ Virginia Jobbers at 925.

been raised with respect to the merits.¹¹

Absent a stay, a vast number of parties whose applications are awaiting approval and/or frequency coordination will be irreparably harmed. These applicants, many of whom are members of AMTA, CICS, ITA and NABER, have submitted applications in good faith to the frequency coordinators and to the Commission, after investing substantial time and expense in system design, application preparation and coordination efforts. The applicants will not recover their expenses during a prolonged or permanent freeze on the processing of existing applications and the acceptance of new applications. Existing operators will lose a competitive edge against numerous market competitors such as cellular and PCS providers. Moreover, new entrants who have applied in good faith based on existing Commission Rules will be shut out of the industry with no immediate recourse.

Furthermore, frequency coordinators have coordinated 800 MHz applications in good faith. The coordinators have based their frequency recommendations for all 800 MHz applications certified to the FCC based on the data bases available at the time each recommendation is performed. These recommendations include moving applicants from requested channels that are not available for assignment and also returning some applications because channels were not available at all. The content of the data bases used by the coordinators is based on all applications on file at the FCC. If the Commission dismisses all pending 800 MHz SMR applications,

¹¹ Washington Transit at 843.

recommendations previously made by the coordinators may, in many instances, no longer be valid. As a result, those applicants who were re-coordinated or not coordinated based on the data base at the time of the coordination recommendation will be irreparably harmed.

Grant of the requested stay will not harm other parties. If the Commission does lift the freeze, the FCC and the coordinators will simply return to business as usual. Neither the public nor individual applicants will be harmed. Conversely, there is the potential for significant prejudice to SMR applicants and unwarranted disruption of the coordination function for all SMR, business, industrial and land transportation applicants for 800 MHz frequencies unless the Commission lifts the freeze. Clearly, the adverse impact will not be confined to SMR applicants.

The application freeze announced August 9, 1994 is not in the public interest. The freeze is contrary to Congressional efforts to establish regulatory parity between existing common carrier communications systems and licensees of wide-area enhanced SMR systems. The freeze will strand capital investment already made in business plans and application preparation, and could jeopardize the financial position of smaller SMR systems that must compete under the CMRS classification. Deprived of the immediate opportunity to apply for additional frequencies, SMR licensees may well find that existing sources of capital will look elsewhere for investment opportunities. The harm caused to these businesses, most of them small, will necessarily extend to their hundreds of

thousands of customers, the businesses and individuals that rely on SMR systems for vital communications.

Having demonstrated the above, ITA, NABER, AMTA and CICS believe there is compelling merit to this Emergency Request for Stay. In view of the overriding public interest considerations, the petitioners believe they are likely to prevail on the merits.

2. The FCC's Actions are Contrary to the Congressional Mandate of "Regulatory Parity."

In the Omnibus Budget Reconciliation Act of 1993,¹² Congress directed the FCC to reclassify all land mobile radio services as either Commercial or Private Mobile Radio Service ("CMRS" or "PMRS"). The Congressional mandate to the Commission was driven by the concept of "regulatory parity"; i.e, a "level playing field" for all functionally equivalent mobile services in the rapidly-developing wireless communications marketplace. Congress' fundamental objective was to enhance competition among these services in furtherance of the public interest.

a. The Commission has been directed to regulate similar services comparably.

The Commission was further directed to modify its Rules within one year to ensure that like, or "substantially similar", CMRS services were subject to comparable regulations; the FNPRM in the instant proceeding was the Commission's means of reaching that goal. In the FNPRM, the FCC suggested that wide-area, digital SMR ("ESMR") service is substantially similar to cellular radio

¹² Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

service.¹³ As described in the News Release, however, the Commission has expanded the scope of regulatory symmetry, concluding that "virtually all CMRS services are actually or potentially competitive with each other to some degree, and . . . the range of services that are deemed substantially similar for purposes of establishing comparable technical requirements should therefore be defined broadly." ¹⁴ Given this language, it is likely that wide-area SMR systems at least, if not all of the SMR industry, will be considered CMRS services subject to comparable regulation under the mandate of regulatory parity.

b. The freeze constitutes discriminatory treatment of one segment of the CMRS marketplace.

The imposition of a freeze is antithetical to Congress's regulatory parity directive. Rather than enhancing competition by implementing comparable regulations, it has singled out a single CMRS service -- 800 MHz SMR -- and frozen all activity in that industry. SMR operators are unable to modify their systems to accommodate site problems, customer demand or to implement long-term business plans. Both traditional analog, small-business SMR operators and larger ESMR licensees must halt their normal development for an indefinite period of time. Meanwhile, competitive services such as cellular are free to conduct "business as usual." The Petitioners submit that the freeze is thus contradictory to the entire concept of regulatory parity.

¹³ FNPRM at ¶ 15.

¹⁴ News Release at p.1.

Further, the freeze comes at a critical point in the SMR industry.¹⁵ The 800 MHz spectrum is in heavy demand by both traditional SMR and ESMR licensees: traditional SMR operators require expansion of their systems to continue providing low-cost service to increasing numbers of business users, while ESMR systems are just now launching commercial service aimed at business users and the general public. Both types of SMR licensees require regulatory certainty to carry their plans forward.

The FCC's freeze on the acceptance of all SMR applications will have precisely the opposite effect. Operators of existing systems will be denied an opportunity to relocate or otherwise modify their facilities on a permanent basis, even if the move is dictated by circumstances entirely beyond their control. For example, an SMR licensee operating on a tower which is hit by lightning would not be able to move permanently to an alternate site under the FCC's freeze, even though doing so would not expand the authorization from either a geographic or spectrum perspective. It would simply mean that the same system was operating at a different location.

Similarly, wide-area SMR "implementation applications" do not constitute the creation of "new" SMR systems. They do not expand existing footprints or seek new SMR authority outside those defined geographic areas. Rather, they permit the licensee to reconfigure

¹⁵ See, e.g., Nextel to Buy Rival, Licenses for \$2.4 Billion, WALL ST. J., August 8, 1994 at A3, col. 1 ("Nextel is racing to build a nationwide system to rival the cellular-phone giants, which already provide wireless services using a proven technology.")

its system design, using existing spectrum within existing boundaries to achieve more efficient use of assigned frequencies in an area in which the wide-area licensee is the only party which could be authorized to utilize them.

As the Commission has recognized, ESMR service is designed to provide the public a high-quality, spectrum-efficient alternative to the cellular duopoly. However, this emerging service is still in its infancy, with only limited service areas and a few thousand customers at this time.¹⁶ Adjustments to transmitter locations, "fill-ins" of coverage gaps and other minor changes are naturally necessary in this early stage of service development. Moreover, in order to compete effectively with other, better-established CMRS services, ESMR operators must be permitted to continue to implement long-term business plans in a timely fashion. The Petitioners submit that a continued freeze could severely damage the continued growth of the SMR industry. The freeze, particularly on implementing applications for wide-area systems, could cripple the emerging ESMR industry. ESMR operators must be able to continue the process of reconfiguring their existing high power, analog SMR systems into multiple-site, low power, digital wide-area enhanced SMR systems throughout their already-granted service (footprint) areas.

Since neither this situation nor the necessary relocation of an existing system described above involve the authorization of

¹⁶ Commercial ESMR service is currently being offered in Los Angeles, San Francisco and Denver.

"new" SMR systems, the Petitioners urge the Commission to continue accepting and processing such requests.

3. The Freeze Does Not Curtail the Licensing of 800 MHz Spectrum.

As currently implemented, the freeze does not halt the licensing of available 800 MHz spectrum. It only singles out a particular class of eligible users of the band for discriminatory treatment.

Under Part 90 of the Rules, the 800 MHz spectrum available for SMR use is also open to other users, including Business, Industrial/Land Transportation and Public Safety applicants.¹⁷ While some 800 MHz channels are set aside for their use, these classes of eligible users may also apply for General Category and SMR channels through intercategory sharing.¹⁸

None of these other classes of eligible users is currently precluded from applying for, and being granted licenses in, 800 MHz SMR spectrum. The Association of Public-Safety Communications Officials-International ("APCO"), which coordinates public safety applications in this band, has not ceased its filings. In areas of the country where designated Public Safety channels are no longer available, these applicants may still receive licenses for all available 800 MHz channels. Thus, the freeze on SMR applications does not freeze the landscape of the 800 MHz band in anticipation of the 800 MHz SMR wide-area auction proposal outlined in the News

¹⁷ 47 C.F.R. § 90.603.

¹⁸ See 47 C.F.R. § 90.621.

Release. Instead, it simply precludes the very systems entitled to regulatory parity under the Commission's own determination from utilizing the spectrum. This cannot be the result intended by Congress.

APCO is the only 800 MHz frequency coordinator that is unaffected by the application freeze.¹⁹ Though the Commission has authorized APCO to coordinate conventional SMR applications, APCO has, by choice, restricted its coordination activities to public safety applications. For this reason, APCO will be able to coordinate applications without disruption. There is no need for APCO to concern itself with extending equitable treatment to conventional SMR applications because it does not coordinate such applications. Similarly, there is no need for APCO to hold up on applications for the Public Safety category because the rules do not allow SMR licensees to access public safety channels.

Accordingly, while ITA and NABER face the dilemma of how to accord equitable treatment to all of the pending applications, APCO will be able to continue filing applications with the FCC. Public safety applicants will benefit from the filing of these applications at the expense of SMR, industrial, land transportation and business applicants.

To highlight the special concerns that apply with respect to both applications awaiting frequency coordination and applications already on file with the Commission, this Emergency Request for

¹⁹ APCO, the Association of Public-Safety Communications Officials-International, is the Commission's designated frequency coordinator for 800 MHz public safety applications.

Stay further discusses the implications of both aspects of the freeze independently.

C. Applications Awaiting Processing at the Commission.

In anticipation of modifying its 800 MHz SMR rules at some undetermined future date, the FCC has halted processing of 800 MHz SMR applications now pending at the Private Radio Bureau's Licensing Division in Gettysburg. The Petitioners urge the Commission to resume processing these applications.

Pending applications were filed in good faith under existing rules, and the Commission has found them acceptable for filing. They represent an investment of tens of millions of dollars by the SMR industry in spectrum engineering, application preparation and frequency coordination fees, as well as business plan analysis costs. Both large and small applicants have committed these funds in reliance on the Rules and policies in effect at the time of filing; in many cases, they have already waited months to implement their business plans and provide new or additional SMR service to the public in their service areas.²⁰

Further, the entities represented by pending applications have

²⁰ FCC precedent does not support the dismissal of the pending applications. In 1983, the FCC dismissed approximately 1400 applications pending for facilities in the 2.5 GHz band. In that case, however, the circumstances were widely different from those present in the SMR service. Unlike the currently pending SMR applications, all of the 2.5 GHz applications were for new facilities in a new service. Additionally, the Commission determined that the pending applications had to be modified to reflect new emission designators. In re Various Methods of Transmitting Program Material to Hotels and Similar Locations, Memorandum Opinion and Order, Docket No. 19671, 99 F.C.C.2d 715 (1983), review denied, 762 F.2d 138 (D.C. Cir. 1985).

enormous potential for adding much-needed jobs in the rapidly-growing telecommunications industry. These jobs are vital to the economic well-being of the nation, especially to rural areas. Should the FCC decline to process the pending applications, the major investment already made by large and small operators will be lost, along with the jobs and economic contributions that would have been provided by SMR operators.²¹

D. Applications Awaiting Frequency Coordination

NABER and ITA have a combined total of approximately 3,000 SMR applications in various stages of frequency coordination that are directly affected by the freeze. In the vast majority of cases, the applicants filing these applications are members of AMTA, NABER or CICS. These parties relied on the Commission's established processes and filed their applications with ITA and NABER in the expectation that, upon completion of frequency coordination, their applications would be considered for grant by the FCC.

1. The Freeze Has Adversely Affected the Applications of all 800 MHz Eligibles Awaiting Filing with the Commission.

In stark contrast to earlier "freezes" imposed by the Commission, the freeze imposed on the filing of new SMR applications has the potential to change the relative position of

²¹ Petitioners have already received reports from their members of uneasiness in the financial investment community due to the uncertainty of SMR application status. Continued delay or a decision not to process these applications could well lead to the loss of substantial investment in licensees from outside sources, a further competitive disadvantage.

competing applications. The applications pending with both ITA and NABER include applications for the General Category channels submitted by four categories of applicants: SMR, Industrial, Land Transportation and Business Radio entities. Under the Commission's existing rules, all four categories of applicants have equal rights to apply for the General Category channels. Additionally, the pending applications also include requests for Business and Industrial/Land Transportation category channels filed by business, industrial, land transportation and SMR applicants.²²

When the Commission imposed a freeze on the filing of applications for the 220-222 MHz band, it was careful to ensure that the "action will not place prospective applicants for the 220-222 MHz frequency band at a disadvantage."²³ The Commission explained:

[t]he relative position of any new applications with respect to all previously filed applications will . . . remain unchanged irrespective of whether these new applications were filed in the near future or, alternatively, at such time as the freeze is lifted.²⁴

Under the terms of the 800 MHz SMR freeze, the coordinators are precluded from filing SMR applications with the Commission. The imposition of the freeze therefore compels NABER and ITA to

²² In accordance with § 90.621(e)(2) of the rules, licensees of SMR systems may request frequencies allocated to the 800 MHz Business and Industrial/Land Transportation categories when there are no available frequencies in the SMR category.

²³ In re Acceptance of 220-222 MHz Private Land Mobile Applications, Order, DA 91-647, 6 FCC Rcd. 3333 (1991).

²⁴ Id.

choose between two equally undesirable options:

- a. filing the Industrial, Land Transportation and Business applications, but not SMR applications, with the FCC; or
- b. declining to file all pending applications, regardless of whether they are for SMR, Industrial, Land Transportation and Business licenses.

The first option would disadvantage those SMR applicants who requested coordination in advance of industrial, land transportation and business applicants competing for the same channels. It would also be in violation of the FCC requirement that coordinators process applications sequentially according to date of receipt.²⁵

The second option, though more fair to SMR applicants, would disadvantage the Industrial, Land Transportation and Business applicants who are entitled to have their applications coordinated in a timely manner. These applicants, such as utilities, airlines and construction and trucking firms, engage in activities that represent the backbone of the U.S. economy. They must be able to establish new radio systems to support their essential day-to-day communications requirements.

Regardless of the option they choose, NABER and ITA will necessarily be in the position of adversely affecting one or more classes of applicants.

2. The Freeze Will Impose Undue Hardship on the Petitioners.

NABER, ITA, AMTA and CICS are service organizations. ITA and

²⁵ Report and Order, PR Docket No. 83-737, 103 F.C.C.2d 1093 at paragraph 21.

NABER provide engineering and frequency coordination services to the public under certification from the FCC. Both organizations have accepted a large number of applications from applicants on the premise that the applications were acceptable for filing with the FCC. Both organizations have invested considerable time and effort in logging in and performing preliminary analysis of the applications that are now in various stages of frequency coordination.

If the freeze remains in place, the effect upon NABER and ITA will be significant. There will be no easy approach to the disposition of the thousands of applications now in processing. The freeze will dramatically affect the speed of service of those applications being coordinated for other frequency bands.

E. The Commission Has Lifted Previous Freezes.

In past years, the FCC has lifted various freezes imposed on the filing of applications when the freezes imposed a hardship on applicants and the public. In 1991, the Commission lifted its freeze on the filing of 929-930 MHz private carrier paging ("PCP") applications because it found that: (1) private carrier paging entities had made "significant capital expenditures that would, in effect, be inadvertently stranded during the pendency of the licensing freeze"; and (2) the freeze could "result in temporary denial of service in many areas."²⁶ In 1993, the Commission again

²⁶ In re Acceptance of 929-930 MHz One-way Paging Applications, Order (DA 91-1407), 6 FCC Rcd. 6825 (1991).